credit, the licensee must first seek Commission approval and reimburse the government for the amount of the bidding credit, or the difference between its original bidding credit and the bidding credit for which it is eligible after the ownership change, plus interest at the rate imposed for installment financing at the time the license was awarded. Additionally, if an investor subsequently purchases an interest in the business and, as a result, the gross revenues of the business exceed the applicable financial caps, this unjust enrichment provision will apply.

361. The amount of this payment will be reduced over time as follows: (1) a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of small businesses transferring to businesses having average gross revenues of more than $40 million but not more than $75 million, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent; and (4) in year five the payment will be 25 percent, after which there will be no required payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment, transfer, or ownership change.

(4) Rural Telephone Companies

362. We sought comment in the *Third NPRM* on whether we should provide bidding credits or other special provisions for rural telephone companies seeking to become LMDS providers.[560] However, no comments were filed on this issue. We do not believe that special provisions are needed to ensure adequate participation by rural telephone companies in the provision of LMDS services for the same reasons stated in the *Third NPRM*.[561] Further, because we are providing installment payments for entities with average annual gross revenues as high as $75 million, we believe that many rural telephone companies may qualify for installment payments. Also, the degree of flexibility we will afford in the use of this spectrum, including provisions for partitioning or disaggregating spectrum, should assist in satisfying the spectrum needs of rural telephone companies at low cost.[562] Therefore, we conclude that the interests of rural telephone companies are adequately addressed by the LMDS rules we adopt herein.

---

[560] *Third NPRM*, 11 FCC Rcd at 124 (para. 194).

[561] *Id.*

[562] See paras. 140-145, *supra*.

363. The ability of rural telephone companies to bid for and hold licenses in each company's respective region is subject to the eligibility requirements which are delineated in paragraphs 185-199, *supra.*

E. Preemption

1. Background; Comments

364. In the *First NPRM,* we discussed the standards that govern our determination whether State and local legal requirements imposed on LMDS licensees should be preempted. We stated that, for LMDS licensees choosing non-common carrier status, "preemption is primarily a function of the extent of the conflict between federal and state and local regulation."[563] We tentatively concluded that State entry and rate regulation should be preempted for such systems providing video programming. Beyond that, however, we found that at that stage in the proceeding the record did not contain any information regarding the extent to which State and local regulations might conflict with provision of LMDS. We pointed out that, although State law which conflicts with the Federal provisions must be preempted, we required a factual record on this subject prior to making any final preemption determination.[564] We requested comment on the extent to which the Commission may be required to preempt State entry and rate regulation of LMDS licensees choosing non-common carrier status.

365. For licensees providing telecommunications services as common carriers, we have jurisdiction only over the interstate portions of those services and could preempt State regulation of the intrastate common carrier LMDS services if we make certain findings under the requirements set out in *Louisiana PSC.*[565] Accordingly, we requested comments on addressing the questions of whether the LMDS telecommunications services can be severed into intrastate and interstate components and, if not, whether potential State regulation would thwart or impede the Commission's interstate regulatory objectives for LMDS. We had incomplete technological information on the structure of system operations and no evidence that any particular State regulatory policies would thwart or impede our efforts to establish

---

[563] *First NPRM,* 8 FCC Rcd at 562 (para. 28) (citing Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, Memorandum Opinion and Order, FCC 85-506, 101 FCC 2d 952, 959 (1985)).

[564] *Id.* (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)).

[565] *Id.* at 562 (para. 29) (citing Louisiana Public Serv. Comm'n v. F.C.C., 476 U.S. 355 (1986) (*Louisiana PSC*), National Association of Regulatory Utility Commissioners v. F.C.C., 880 F.2d 422 (D.C. Cir. 1989), Computer III Remand Proceedings, 6 FCC Rcd 7571, 7625-37 (1991), Mobile Telecommunications Technologies Corporation, 7 FCC Rcd 4061 (1992)).

this new services. Commenters were asked to provide a factual basis for a determination of the interstate/intrastate nature of potential telecommunications services and the necessity of preempting State regulation of intrastate common carrier non-video services.

366. In the *Third NPRM,* we renewed our tentative conclusion that we cannot make a determination at that time that preemption of State regulation of common carrier aspects of LMDS is appropriate. We also renewed our tentative conclusion that State entry and rate regulation should be preempted for LMDS licensees providing non-common carrier video programming. With regard to all other preemption issues, we proposed to defer such issues for future consideration as they arise on a case by case basis. We requested further comments on these proposals.[566]

367. Comments that responded to our requests favor preemption of State and local regulation of LMDS video distribution systems and telecommunications services and of the placement of reception and transmission devices or facilities. With respect to video programming, GEC requests that we adopt rules that preempt State regulation of LMDS video services to ensure that all systems are under the same rules. It argues this is necessary for national consistency and for the operations of systems that cross States lines, which may be subject to different rate structures, programming selection, or equipment use.[567] CellularVision supports our tentative conclusion that intrastate regulation of video programming should be preempted, inasmuch as such service is inherently interstate in nature and such regulation could impede competition and the prompt deployment of LMDS nationwide.[568]

368. Bell Atlantic also agrees that intrastate regulation of video distribution service should be preempted and argues that there is a strong Federal interest in promoting competition to monopoly cable television systems. Bell Atlantic is concerned about local regulation of transmitting and receiving antennas. It points out that the Commission has preempted local zoning restrictions with respect to satellite antennas that were found to inhibit access to satellite services. It argues that these local zoning regulations pose the same threat to the Federal interest in delivering video programming through LMDS technology and

---

[566] *Third NPRM,* 11 Rcd at 94-95 (paras. 110-112).

[567] GEC Comments to *Third NPRM* at 5.

[568] CellularVision Comments to *Third NPRM* at 22.

requests the Commission to expand a pending Notice of Proposed Rulemaking revising the satellite rule to cover LMDS antennas.[569]

369. With regard to preemption of State regulation of common carrier telecommunications service by LMDS, CellularVision agrees with our conclusion in the *Third NPRM* to defer consideration of such issues until they arise.[570] Duncan points out generally that local regulations concern valid issues of health and safety, as well as land use. However, it requests that we now raise and address issues concerning zoning, land use, and other restrictions on location of towers and antenna before licensees begin to roll out a service.[571]

2. Decision

370. As explained in *Louisiana PSC*, preemption occurs in the following ways.[572] It occurs when Congress, in enacting a Federal statute, expresses a clear intent to preempt State law or has legislated comprehensively, thus occupying an entire field of regulation so that there is no room for State law or the State law is an obstacle to the Congressional objectives. Preemption also occurs when there is outright conflict between Federal and State law, when compliance with both Federal and State law is in effect physically impossible, or when there is implicit in Federal law a barrier to State regulation. Preemption also may result not only from action taken by Congress itself, but a Federal agency acting within the scope of its congressionally delegated authority may preempt State regulation. In the *First NPRM,* we set out the general standards on which we rely to consider conflicting laws and determine when preemption is warranted, and requested commenters to submit the technical and operational information necessary to make the determination. As noted, the standards varied between common and non-common carrier services.

371. Commenters did not submit the specific information for the factual basis on which we must rely to determine whether preemption of a specific State or local regulation is warranted. While they agree with our tentative finding that we should preempt intrastate regulation of video distribution by LMDS providers, they do not indicate what regulations conflict with the potential offering of LMDS and what interests are at stake. As a new service, LMDS has not yet been initiated under the service rules we adopt here and the extent

---

[569] Bell Atlantic Comments to *Third NPRM* at 7-8 (citing Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, DA 91-577, 45-DCC-MISC-93, Notice of Proposed Rulemaking, 10 FCC Rcd 6982 (1995) (*Earth Station Notice*)).

[570] CellularVision Comments to *Third NPRM* at 22.

[571] Duncan Comments to *Third NPRM* at 4-5.

[572] *Louisiana PSC*, 476 U.S. at 368-69.

of potential conflicts with intrastate regulations is not known, particularly where no factual basis is provided for consideration. Accordingly, we will defer preemption issues in LMDS for future consideration as they arise on a case by case basis.

372. Under Commission procedures, petitions are filed for preemption with the necessary information under the pertinent standards for us to determine whether preemption is warranted. We set out below the general standards to guide petitioners in filing for preemption in those situations where Congress and our regulations do not expressly preempt certain State or local regulations. We also set out the statutory and regulatory provisions that expressly extend preemption jurisdiction to us in the services included in LMDS. The 1996 Act included several provisions that affect the intrastate regulation of telecommunications services and video programming. These include provisions that preempt or limit the intrastate regulation of antennas and facilities that address in part the concerns of Bell Atlantic, Duncan, and GEC regarding consistency in the placement and use of such equipment.

373. We are confident that State and local governments will endeavor to legislate in a manner that affords appropriate recognition to the important Federal interests at stake here in implementing LMDS and thereby avoid unnecessary conflicts with Federal policy, as well as time consuming and expensive litigation in this area. LMDS licensees that believe that local or State governments have been overreaching and may have precluded accomplishment of their legitimate communications goals should bring our policies or the law discussed here to the attention of such governments. Licensees may otherwise submit petitions for our review of the conduct that they seek to preempt.

a. Non-Common Carrier Services and Video Programming

(1) General Standards

374. As commenters point out, the courts have held that video programming services are inherently interstate and, therefore, the Commission has jurisdiction to promulgate rules and preempt State or local regulation.[573] The Supreme Court has articulated the standards for Federal preemption of non-Federal regulation in considering cable services in *City of New York*. The Court explained that "[w]hen the Federal government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes."[574] The Commission may preempt non-Federal regulations when the non-Federal body "has created an obstacle to the

[573] United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968); New York State Commission on Cable Television v. F.C.C., 669 F.2d 58, 65 (2d Cir. 1982).

[574] City of New York v. F.C.C., 486 U.S. 57 (1988) (*City of New York*).

accomplishment and execution of the full purposes and objectives'' of the Commission acting within its congressionally delegated authority.[575]

375. We have considered preemption petitions filed under these standards, as Bell Atlantic points out, and we subsequently adopted the proposed rules that preempt certain State and local regulation after weighing both the Federal and non-Federal interests.[576] We rely on Section 1 of the Communications Act, which mandates access to communications services by all people in the United States, together with numerous powers granted by Title III of the Act and any other statutory provisions pertinent to the service all would establish the existence of a Federal interest in promoting the service. Whether local regulations interfere with any Federal objectives and there is a local interest to protect are matters for petitioners to demonstrate. Our focus is on the effect of the local interest on the Federal interest and the appropriate accommodation of the local interest involved.

(2) Over-the-Air Reception Devices for Video Programming

376. The 1996 Act provides express authority in Section 207 for the Commission to prohibit all restrictions on over-the-air reception devices.[577] It required us to ''promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming service through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.''[578] We subsequently adopted a rule prohibiting any such governmental restriction, including any State or local law or regulation, and any nongovernmental restriction on property within the exclusive use or control of the viewer in which the viewer has a direct or indirect ownership interest.[579] We requested comment on whether Section 207 applies to restrictions on property not within the exclusive use or control of the viewer and in which the viewer has a direct or indirect property interest, which remains pending a decision.

---

[575] Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 156 (1982).

[576] Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 5809, 5810-12 (paras. 10-15) (1996) (*Earth Station Report and Order*).

[577] Telecommunications Act of 1996, Section 207, 47 U.S.C. § 207.

[578] *Id.*

[579] Preemption of Local Zoning Regulation of Satellite Earth Stations: IB Docket No. 95-59, Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices, Television Broadcast Service and Multichannel Multipoint Distribution Service: CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 96-328, released Aug. 8, 1996 (adopting new Section 1.4000 of the Commission's Rules).

377. In adopting the new rule, we specifically found that LMDS is a closely-related service that Congress did not mean to exclude from the statutory provision and that LMDS would be governed by the same one-meter antenna-size restriction we adopted for protection under the rule for MDS and similar services.[580] We also consolidated for consideration our pending proposal to modify our existing rule prohibiting certain restrictions on satellite antenna reception that we initiated in the *Earth Station Notice* and that Bell Atlantic, in its comments to the *Third NPRM* here, requested we expand to include LMDS reception. Inasmuch as the new Section 207 rule subsumes the pending proceeding and rule revision, as well as includes LMDS in its provisions, we do not need to consider Bell Atlantic's request further.

b. Common Carrier Services and Telecommunications Services

(1) General Standards

378. In *Louisiana PSC* and its progeny, the courts have articulated the general standards that traditionally govern our preemption determinations in cases where common carrier services are involved. In *Louisiana PSC,* the Supreme Court applied Section 2 of the Act in those cases and found that, although it prohibits the Commission from exercising Federal jurisdiction in connection with intrastate communications services, we may preempt State regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation.[581] Federal courts subsequently have held that where interstate services are jurisdictionally mixed with intrastate services and facilities otherwise regulated by the States, State regulation of the intrastate service that affects interstate service may be preempted where the State regulation thwarts or impedes a valid Federal policy.[582] As we stated in the *First NPRM,* petitioners seeking preemption under this standard would provide information on the severability of the interstate and intrastate service and on the State regulatory policies that thwart or impede our efforts in establishing the inseverable LMDS services.[583]

379. However, the 1996 Act includes a broad, preemption provision in Section 253 for the removal of State or local barriers to entry of telecommunications service. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal

---

[580] *Id.* at paras. 30, 37.

[581] *Louisiana PSC*, 476 U.S. at 375 n.4.

[582] Illinois Bell Tel. v. F.C.C., 883 F.2d 104 (D.C. Cir. 1989); California v. F.C.C., 905 F.2d 1217 (9th Cir. 1990).

[583] *First NPRM*, 8 FCC Rcd at 562 (paras. 29-30).

requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.''[584] Certain traditional authorities of the States and local governments are preserved in Sections 253(b) and (c), but expressly defined.[585]

380. We did not initiate a rulemaking to implement Section 253. Rather, Section 253(d) directs the Commission to rule on a petitioner's preemption request after public notice and an opportunity for comment on a particular State or local requirement.[586] We considered the first petition filed under its provisions by Classic Telephone, Inc., in a Memorandum Opinion and Order released October 1, 1996.[587] We concluded that Section 253(a) at the very least proscribes the State and local legal requirements found in the petition that prohibit all but one entity from providing telecommunications services in a particular State or locality.[588] We determined under Section 253 to preempt the decisions denying petitioner's franchise applications. We recently granted another petition under Section 253(a), which was filed by the New England Public Communications Council to preempt a State decision that prohibits a particular class of potential competitors from offering telecommunications services in the State.[589]

(2) Personal Wireless Service Facilities

381. Section 704(a) of the 1996 Act establishes a national wireless telecommunications facilities siting policy by amending Section 332(c) of the Act to include a new paragraph (7) that places limitations on State and local regulation of ''the placement, construction, and modification of personal wireless service facilities'' by requiring that such regulations not unreasonably discriminate among providers of functionally equivalent services,

---

[584] 47 U.S.C. § 253(a).

[585] 47 U.S.C. § 253(b), 253(c).

[586] 47 U.S.C. § 253(d).

[587] Classic Telephone, Petition for Preemption, Declaratory Ruling, and Injunctive Relief, CCB Pol 96-10, Memorandum Opinion and Order, 11 FCC Rcd 13082 (*Classic Order*), *petition for review docketed sub nom.* City of Bogue, Kansas, and City of Hill City, Kansas v. F.C.C., No. 96-1432 (D.C. Cir. filed Nov. 22, 1996). A petition for further enforcement was filed in the docket on December 13, 1996.

[588] *Classic Order*, 11 FCC Rcd at 13084 (para. 25).

[589] New England Public Communications Council, Petition for Preemption Pursuant to Section 253, CCB Pol 96-11, Memorandum Opinion and Order, FCC 96-470, released Dec. 10, 1996 (*New England Payphone Order*).

and not prohibit the provision of personal wireless services.[590] In addition, we are expressly authorized in Section 332(c)(7)(B)(iv) to preempt State and local regulations based on the environmental effects of RF emissions if the facilities comply with our regulations governing such emissions. We recently adopted updated RF exposure guidelines that our licensees are required to follow.[591] Section 704(a) further provides procedures for any person adversely affected by State and local regulations, other than those regarding RF emissions, to seek relief from the State or local authority first and ultimately from the court, rather than the Commission.[592] In cases involving State or local regulation based on RF emissions, any person adversely affected may petition the Commission for relief.

382. Thus, to the extent an LMDS licensee qualifies as a personal wireless service, it may file under the procedures in Section 332(c)(7)(B) concerning the siting of its antenna or other facility for providing services based on RF concerns. Personal wireless services are defined in Section 332(c)(7)(C) as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." An LMDS licensee may engage in exchange access services.

III. ORDER ON RECONSIDERATION OF WAIVER APPLICATION DENIALS

A. Background; Pleadings

383. In conjunction with the *First NPRM*, we denied 971 waiver applications filed by parties in the wake of *Hye Crest Management* seeking waivers similar to those we granted to authorize CellularVision's predecessor-in-interest to provide LMDS in the NYPMSA.[593] The Commission denied the applications because they were based on the existing point-to-point rules which we concluded were inappropriate for LMDS; because granting the applications would have resulted in a *de facto* reallocation of the spectrum; and because grant of the waivers would have been detrimental to the assigned users of the band. In addition, we found that grant of so many waivers would have been contrary to guidance provided by the courts.[594]

---

[590] 47 U.S.C. § 332(c)(7)(B).

[591] *RF Guidelines Report and Order*, at paras. 166-168, Appendix C.

[592] 47 U.S.C. §§ 704, 332(c)(7). We reviewed the provisions in two Fact Sheets. National Wireless Facilities Siting Policies, Fact Sheet #1, Document Number 6507, released Apr. 23, 1996, and Fact Sheet #2, Document Number 6508, released Sept. 17, 1996.

[593] *See First NPRM*, 8 FCC Rcd at 564-65 (paras. 51-53), Appendix C.

[594] *See, e.g.*, WAIT Radio v. F.C.C., 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*).

384. The Texas Petitioners have requested that we reconsider our denial of their applications for service in the Rio Grande Valley area. In addition, Gustine filed a petition for reconsideration. These parties argue that their applications are unique. The Texas Petitioners argue that their plan will allow distance education to revitalize the Rio Grande Valley region. Gustine distinguishes its application because no other applicant is a municipality, and no other applicant brings Gustine's unique features to the proposed service offering.

385. Video/Phone has taken the lead for a number of other waiver applicants, each of which has filed brief, nearly identical petitions endorsing Video/Phone's petition.[595] Video/Phone claims that it would still be possible for the Commission to meet the needs of future point-to-point applicants even if it were to grant the waiver applications.[596] Video/Phone argues it was arbitrary and capricious for the Commission to dismiss the waiver requests without considering the merits of each or the public interest benefits that would result from prompt deployment of the new services.

386. The Joint Petitioners filed a separate petition for reconsideration, in addition to a petition supporting Video/Phone's petition. The parties argue that (1) if an application was accepted for filing in the Commission's public notices and if there are no mutually exclusive applications filed; and (2) if an MMDS system cannot be established in the market, then good cause is shown to grant a waiver application.

387. M3ITC filed a petition for reconsideration asserting that its applications are unique because of its wholly local orientation. GEC suggests several procedural alternatives for the Commission to reduce the number of applications which it considers for grant.[597] Finally, CHT argues that the Commission's dismissal of its application and waiver request

---

[595] *See* Petitions for Reconsideration filed by Alliance Associates, Birnbaum, BMW, Buchwald, Celltel, Chester, Clark, CPCCI, Cornblatt, CTC Corp, Evanston, Feinberg, Fraiberg, FTI, Goldberg, Hall, Hascoe, LDH, Likins, Lonergan, Meeker, Melcher, Myers, Peyser, PMJ, La Blanc, J. Robertson, S. Robertson, Rosenkranz, R&R, SCNY, Seaview, L. Siegel, M. Siegel, Sloan, SMC, Snelling, TIC, THI, VCC, Wechsler, and Wolff.

[596] Video/Phone's petition includes an exhibit comprised of a statement by Don Franco, President of Video/Phone Systems, Inc., suggesting that any point-to-point applications that may be filed in the 28 GHz band could be accommodated notwithstanding the existence of point-to-multipoint systems in the same band.

[597] The alternatives include considering all applications after a lottery resolves mutually exclusive situations; considering only applications placed on public notice by the date of the freeze; considering only applications which are the sole applications in a given market area; considering only applications which are the sole applications and which have been placed on public notice; and considering only applications received as of a designated date, set by the Commission, intended to limit waiver requests to a number which can be reviewed and processed with reasonable expedition.

without regard to the merits is an abuse of the Commission's discretion and a violation of CHT's procedural due process rights.

B. Decision

388. As a threshold matter, we note that, although the Commission has wide latitude to choose whether it will proceed by adjudication (*e.g.*, waiver proceedings) or by rulemaking,[598] it is nevertheless the case that guidance from the courts indicates that issues of general applicability are more suited to rulemaking than to adjudication.[599] Here, we conclude that the practical effect of granting the waiver applicants' requests to relieve them of the obligation of providing point-to-point service, in a frequency band for which only point-to-point service rules existed, would have established a policy of general applicability to all operators in the 28 GHz band. This is particularly true because, if we had granted a large portion of the waivers requested, there would have been few, if any, geographic areas available for point-to-point service in this band. Moreover, the attempts by some petitioners to reduce, through *post facto* procedural rules, the number of applications which we would consider simply would serve to establish further policies of general applicability, albeit of an exclusionary nature. Accordingly, in fairness to all parties interested in providing services in the 28 GHz band, we chose to proceed by rulemaking rather than the adjudicatory path of waiver.

389. In addition, the features in applications for which the applicants claim uniqueness as a justification for favorable adjudication of their waiver requests are not the type for which retrospective determination is appropriate. For example, the extent to which educational institutions, local interests, or municipal entities may be favored in the licensing process is a matter of public policy of general applicability. Such policy often may be better ascertained after a notice-and-comment rulemaking proceeding. The specific public interest factors justifying award of an individual application are part of the policy determination which is this Commission's responsibility to ascertain in connection with adjudication of individual applications.[600] Again, we believe that in this case, rulemaking rather than individual adjudication is the better method to set national policy in a matter of frequency designation.

---

[598] *See* SEC v. Chenery Corp., 332 U.S. 194 (1947).

[599] National Small Shipment Traffic Conf. v. I.C.C., 725 F.2d 1442, 1447-48 (D.C. Cir. 1984) ("Trial-like procedures are particularly appropriate for retrospective determination of specific facts . . . [while] [n]otice-and-comment procedures . . . are especially suited to determining legislative facts and policy of general, prospective applicability.").

[600] *Cf.* F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775, 810 (1978) ("[T]he weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance.").

390. Even had we chosen to proceed by waiver, applicants have not met the applicable standards. Guidance on standards for waiving our rules is provided by the courts: "[a]n applicant for waiver faces a high hurdle even at the starting gate."[601] On appeal, the petitioner must show that the Commission's action was based on insubstantial reasons amounting to an abuse of discretion.[602] Our specific standards for the waiver of a frequency allocation are discussed in *Big Bend Telephone*.[603] *Big Bend Telephone* sets forth the following demonstrations necessary for a waiver: "that the existing frequency allocation is not suited or is insufficient to accommodate the applicant's requirements; that the frequencies requested are under-utililzed; that the proposed use of the frequencies will not be detrimental to their assigned users; and that the public interest will be served by a grant of the waiver."[604] Two of the *Big Bend Telephone* standards are relevant here: that the proposed use of the frequencies will not be detrimental to their assigned users, and that the public interest will be served by grant of the waiver. As discussed below, petitioners do not meet these standards for waiver of our rules.

1. Effect on Assigned Users

391. Petitioners argue that the *First NPRM* was inconsistent in finding that the 28 GHz frequency band was fallow while at the same time finding that grant of the waiver applications would be detrimental to the assigned users of the 28 GHz band. First, we note that the *Big Bend Telephone* standards require findings both that the frequencies are under-utilized and that the proposed use of the frequencies will not be detrimental to their assigned users. In *Big Bend Telephone*, the Commission found that the Broadcast Auxiliary frequencies at issue were lying fallow, but we could not conclude that the proposed use of the frequencies would not be detrimental to their assigned users because such use might foreclose future broadcast auxiliary users.[605]

392. Similarly, in our Order denying the petitions for waiver of our 28 GHz band rules, we found that granting these petitions for waiver would be detrimental to the assigned users defined as potential common carrier point-to-point applicants. We believe that the

---

[601] *WAIT Radio,* 418 F.2d at 1157.

[602] Turro v. F.C.C., 859 F.2d 1498 (D.C.Cir. 1988).

[603] Big Bend Telephone Company, Inc. and Dell Telephone Cooperative, Inc., File Nos. 14850-CF-P-84 through 14949-CF-P-84, File Nos. 14811-CF-P-84 through 14848-CF-P-84 2, Memorandum Opinion and Order, 2 FCC Rcd 2413 (1986)(*Big Bend Telephone*).

[604] *Id.* at 2414 (para. 13) (footnote omitted).

[605] *Id.* at 2414 (para. 16).

potential for point-to-point applicants was not speculative because Harris had filed a petition for rulemaking requesting the Commission to channelize the 28 GHz band for manufacturers of point-to-point equipment. The point-to-point manufacturing industry was prepared to begin developing equipment for the band. Harris's petition was addressed in the *First NPRM*, but the channelization proposed in the *First NPRM* was not consistent with that proposed by Harris. We determined that point-to-point service was not the best use of the band, and proposed redesignating the entire 2 gigahertz to be used for point-to-multipoint services.

393. By making this proposal, we would have removed the spectrum from availability to point-to-point users except on the basis of case-by-case coordination. At a minimum, this was an issue on which the Commission could expect to receive comments from point-to-point service providers. Accordingly, in view of the interest expressed by point-to-point manufacturers, and their request that channelization be proposed in a manner inconsistent with LMDS channelization, it is obvious that granting waiver applicants' requests would have been detrimental to the assigned users, namely, potential point-to-point service providers and equipment manufacturers.[606]

394. In addition, we do not agree with Video/Phone's suggestion that gradual deployment of service in the 28 GHz band would protect the interests of point-to-point licensees if any were to be licensed in the band. Video/Phone's exhibit acknowledges that if we were to authorize any point-to-point licensees in the 28 GHz band, they ultimately would have to be moved out of the band to new spectrum as LMDS expands. In view of the facts that such spectrum has not been identified, and neither have the policies for how the incumbents would be relocated to new spectrum, we do not believe that this option is viable. Our experience with relocating incumbent point-to-point microwave licensees for PCS has taught us that this is not a procedure which we would deliberately establish for the future.

395. Subsequent events have proven that the decision in the *First NPRM* was appropriate. TIA and Harris have vigorously opposed our proposals with regard to point-to-point services in the 28 GHz band throughout this proceeding. These point-to-point industry representatives insist that the proposed LMDS rules are inconsistent with the parties' preferred method of operations. Such issues are more appropriately examined in the context of a rulemaking than in the context of individual adjudicatory proceedings for hundreds of waiver applications.

396. Moreover, although not clearly foreseen in the *First NPRM*, there are other assigned users of the 28 GHz band for whom grant of the waiver applications would have

[606] With the issuance of *Hye Crest Management*, only half of the 28 GHz band was authorized for point-to-multipoint service in one metropolitan area. The remainder of the 28 GHz band was still available for point-to-point service in all other service areas.

been detrimental. Fixed satellite service uplinks are also authorized to be licensed in the 28 GHz band.[607] The *First NPRM* requested comment from fixed satellite service providers and many of them responded, indicating their extensive plans for using this spectrum. These parties have indicated that their plans are not able to be coordinated with point-to-point use.[608] Accordingly, subsequent events have borne out the correctness of the Commission's finding that grant of the waiver applications would have been detrimental to the assigned users of the band.

2. Evaluation of Public Interest Arguments

397. The *First NPRM* also stated that the waiver applications were being denied because of our conclusion that the existing point-to-point rules were not appropriate for the service proposed by applicants, and it thus would not be in the public interest to grant the waivers because such a grant would result in the offering of services on a widespread basis that were not congruent with the existing licensing framework. For example, waiver applicants requested a minimum of 1 gigahertz of spectrum each. The typical point-to-point application would request only 6 megahertz of spectrum. Moreover, the geographic area to be covered normally would be only that involved in the direct line between two directionalized antennas, rather than entire metropolitan areas as proposed by waiver applicants. Grant of a point-to-point application would not normally preclude grant of another application on the same frequency in the same geographic area, since highly directionalized antennas can be coordinated so as not to cause interference to one another.

398. On the other hand, grant of the waiver applications would have precluded another applicant from using the same frequencies in an entire geographic area. Finally, mutually exclusive applicants for Part 21 fixed microwave spectrum must be designated for comparative hearing. This is the only procedure available to choose among mutually exclusive waiver applicants. Thus, the lottery procedures suggested by some petitioners could not have been conducted without an additional rulemaking proceeding. In sum, the nature of the services sought to be offered pursuant to the waiver applications, unlike point-to-point applications, raised a host of issues that extended beyond the bounds of the services contemplated under the existing point-to-point rules. We thus concluded that grant of the waivers would not serve the public interest, and the parties seeking reconsideration of that conclusion present no facts or arguments that cause us to alter our determination.

---

[607] 47 CFR § 2.106.

[608] *See, e.g.*, Hughes Comments to *First NPRM* at 2. *See also* Hughes Comments to *Third NPRM* at 5; Orion Comments to *Third NPRM* at 2-3; Motorola Comments to *Third NPRM* at 5-6; Teledesic Comments to *Third NPRM* at 3.

399. Petitioners contend that their applications should have been granted notwithstanding the pendency of the rulemaking. Video/Phone in particular argues that, consistent with our previous practice, we could have granted the applications subject to the outcome of the rulemaking and subject to modification if the rulemaking resulted in parameters different from those authorized in the conditional grant. None of the cases cited by Video/Phone proposes to redesignate a large block of spectrum and to establish a new service comprised of a unique combination of telecommunications services using new technology, as is the case here. The potential differences between the current point-to-point rules and the rules needed for the proposed point-to-multipoint services involving both video distribution and telephony services involve major issues such as eligibility standards for applicants, the configuration of geographic service areas, the regulatory status of licensees, build-out requirements, and the technical parameters of services offered by licensees. Such fundamental changes between old and new rules could require extensive and fundamental changes to conditional licenses granted under earlier rules. Such changes could seriously disrupt service to the public, and therefore, would not be in the public interest in this case.

400. Several of the petitioners argue that bringing needed services to the public justifies granting the applications subject to the outcome of the rulemaking. While it is true that the public interest is strong in facilitating the entry of competitors in the video distribution and telephony markets, we believe that the public interest is better served by developing consistent rules for this competitive entry through a notice and comment proceeding.

401. Some petitioners argue that grant of the waivers and the resulting deployment of new technology would give practical experience with the services and give the United States a "head start" with the new service, and that failing to do so would jeopardize the national interest by delaying introduction of the new technology. We observe, however, that the single grant to CellularVision has provided some practical experience with the new technology, and other manufacturers have proceeded with development of other types of LMDS technology.[609] Moreover, the pendency of this rulemaking proceeding has served to stimulate both domestic and foreign interest in LMDS in the 28 GHz band. Far from exerting a chilling effect, as some commenters feared, the instant proceeding is regarded with interest around the world.

3. Claims Regarding Nature of Services and Types of Applicants

[609] Moreover, a number of manufacturers acquired experimental licenses in the 28 GHz band to test equipment which they were developing.

402. Individual waiver applicants claim that the unique qualities of their service proposals justify their receiving a grant, even if most other such applications are not justified.[610] We have never found, however, that local expertise is a necessary element for video distribution or the provision of common carrier services. Local expertise is of some value in the cable television and broadcast mass media, where licensees hold a public trust and must ensure that they serve the locality in which they operate. No such requirement, however, is currently imposed on wireless cable or telephony operators. In addition, petitioners proposing this criterion in support of a waiver may have done so in the context of the lottery authority where local applicants were often competing with hundreds of other applications. That situation is no longer a problem since we have received competitive bidding authority. Accordingly, local presence or expertise is not a determining factor for waiver of our frequency designation rules in this case.

403. In addition, the Joint Petitioners suggest that the issue of whether MMDS is available in the area for which a waiver application has been filed should be a factor in evaluating whether to grant the applications for waiver. While we appreciate that the Joint Petitioners' proposal was designed to bring video distribution service in some form to areas which might have fallen outside an area of adequate signal strength from MMDS stations, we have chosen to address this service issue through a rulemaking proceeding. We have redesigned the MMDS rules and have already begun the licensing process for MMDS in BTAs.[611] Thus, MMDS should be more easily available to persons in the situation described by the Joint Petitioners.

404. Two other parties suggest that their applications are unique and deserve separate consideration. Gustine and UTPA argue that, because they are a municipality and an educational institution, respectively, their waivers should be granted. We acknowledge the benefits that petitioners' proposals could bring to their areas, particularly UTPA's proposal for providing distance education in the Rio Grande Valley through an arrangement with RioVision. On balance, however, we do not believe it is necessary to grant these waiver requests in order to meet our commitment to facilitating communications in education. As we have already stated, we believe that licensing of LMDS should be based on our newly adopted LMDS rules, rather than through the granting of waivers of our prior licensing and service rules for use of spectrum in the 28 GHz band. We believe that Gustine and UTPA will have the opportunity to obtain access to LMDS services by purchasing those services from a commercial LMDS licensee, by obtaining a 150 megahertz LMDS license within their BTA, or through the disaggregation or partitioning of an LMDS license. And, as noted in paragraph 306, *supra*, we reserve our right, in the future, to adopt requirements to address these needs.

---

[610] *See* Gustine Petition at 3; M3ITC Petition at 2; CHT Petition at 3; UTPA Petition at 4.

[611] *See Competitive Bidding MDS Report and Order.*

Accordingly, we believe that the rules promulgated herein will meet these petitioners' needs and that granting their waiver requests would not be appropriate.

405. Some petitioners propose that we use a variety of procedural cut-off methods to distinguish among the waiver applications.[612] Without addressing our authority to institute retroactive eligibility and application cut-off rules, we clarify that our statement in the *First NPRM* regarding the large number of waiver applications would have been equally applicable if only a few waiver applications had been filed. Any showing of further interest in point-to-multipoint service in the 28 GHz band would have triggered our decision to institute a rulemaking procedure to accommodate the new service.[613] Accordingly, limiting the number of waiver applications that qualify for processing would not have reached the underlying problems associated with the fundamental spectrum use issues raised by these applicants.

406. In sum, none of the petitions for reconsideration will be granted because (1) the proposed use of frequencies was detrimental to the assigned users at the time they were filed; (2) the applications do not meet the public interest standards followed by this Commission for waiver of frequency designation; and (3) the unique offers of service or type of applicant do not outweigh the countervailing public interest in the resolution of the fundamental service issues by rulemaking proceeding rather than adjudication.

IV. FIFTH NOTICE OF PROPOSED RULEMAKING

A. Introduction

407. In the Order we are adopting today we have concluded that we will permit any holder of an LMDS license to partition or disaggregate portions of its authorization. In the recent *Partitioning and Disaggregation Report and Order* we expanded our rules to permit geographic partitioning and disaggregation for broadband PCS licensees, and we sought comment on geographic partitioning and spectrum disaggregation in the case of licensees holding cellular or General Wireless Communications Service (GWCS) licenses.[614]

408. We have previously examined partitioning and disaggregation issues for other services on a service-by-service basis. We presently permit, or are seeking comment on, geo-

---

[612] *See* GEC Petition at 2; Video/Phone Petition at 11.

[613] *Cf. Hye Crest Management*, 6 FCC Rcd at 334 (para. 18).

[614] Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers, GN Docket No. 96-113, Report and Order and Further Notice of Proposed Rulemaking, FCC 96-474, paras. 93-113 (released Dec. 20, 1996) (*Partitioning and Disaggregation Report and Order*).

graphic partitioning and spectrum disaggregation for several services, *e.g.*, MDS,[615] GWCS,[616] 800 MHz Specialized Mobile Radio (SMR),[617] paging,[618] 38 GHz fixed point-to-point microwave,[619] 900 MHz SMR,[620] and WCS.[621]

409. We believe that it is necessary, as part of the next phase of our LMDS rulemaking, to propose specific procedural, administrative, and operational rules to ensure effective implementation of the general partitioning and disaggregation rules we have adopted today. It is our tentative view that a more complete delineation of these partitioning and

---

[615] *Competitive Bidding MDS Report and Order*, 10 FCC Rcd at 9614-15 (paras. 46-47). Additionally, we impose unjust enrichment provisions for partitioning by small businesses to other businesses. *See* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, Memorandum and Order on Reconsideration, 10 FCC Rcd 13821, 13833 (paras. 69-70) (1995).

[616] Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd 624, 665 (para. 105) (1995) (*GWCS Second Report and Order*), *recon. pending* (permitting rural telephone company partitioning).

[617] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463, 1576, 1578, 1580 (paras. 253, 257, 264) (1995) (*800 MHz Second FNPRM*) (requesting comment on partitioning and disaggregation).

[618] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 97-59 (released Feb. 24, 1997).

[619] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, Notice of Proposed Rule Making and Order, 11 FCC Rcd 4930, 4942-43, 4972-73 (paras. 24, 89-90) (1995) (*38 GHz NPRM*) (proposing partitioning for rural telephone companies, and seeking comment on whether partitioning and disaggregation should be available to all licensees in the 37 GHz band).

[620] Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2711-12 (paras. 177-179) (1995) (*900 MHz Second Reconsideration Order*) (adopting rural telephone company partitioning). On September 20, 1996, American Mobile Telecommunications Association, Inc., filed a Petition for Rulemaking requesting the Commission to expand its rules to permit partitioning to include all 900 MHz SMR licenses and to permit spectrum disaggregation. *See* American Mobile Telecommunications Association, Inc., Files Petition for Rulemaking to Expand Geographic Partitioning and Spectrum Disaggregation Provisions for 900 MHz SMR, Public Notice, DA 96-1654 (released Oct. 4, 1996). That Petition for Rulemaking was incorporated into the 800 MHz rulemaking proceeding, PR Docket No. 94-144, where similar partitioning and disaggregation issues are being considered. *Id.*

[621] *See WCS Report and Order.*

disaggregation mechanisms, which we hope to achieve in this rulemaking, will ensure realization of the competitive benefits that are at the core of our partitioning and disaggregation policy.[622]

B. Discussion

1. In General

410. In this Fifth Notice of Proposed Rulemaking we will seek comment as to how various requirements imposed on LMDS licensees (*e.g.*, construction requirements) may be modified if such licensees partition or disaggregate their authorization. We seek comment as to whether partitioning of LMDS licenses should be permitted in a manner similar to the rules for partitioning we have adopted for broadband PCS licensees. In addition, we seek comment as to specific procedural, administrative, and operational rules under which LMDS licensees are permitted to disaggregate their licensed spectrum.

411. In the following paragraphs we seek comment on specific aspects of partitioning and disaggregation, which we will need to address in order to administer the general partitioning and disaggregation rules for LMDS licensees that we have adopted in this Second Report and Order. For example, we seek comment as to whether there are any technical or regulatory constraints unique to the LMDS service that would render any aspects of partitioning or disaggregation impractical or administratively burdensome. Further, we recognize that there are special competitive bidding issues, similar to those raised in the broadband PCS context, that must be resolved if we permit partitioning and disaggregation for LMDS. We shall address those issues separately in paragraphs 420 through 422, *infra*.

2. Available License Area

412. In the *Partitioning and Disaggregation Report and Order*, we found that allowing partitioning of broadband PCS licenses along any service area defined by the parties is the most logical approach.[623] We concluded that allowing the parties to define the partitioned PCS service area would allow licensees to design flexible and efficient partitioning agreements which would permit marketplace forces to determine the most suitable service areas. We also found that requiring PCS partitioning along county lines was too restrictive and might discourage partitioning.[624]

---

[622] See para. 145, *supra*.

[623] *Partitioning and Disaggregation Report and Order*, at para. 24.

[624] *Id.* at paras. 23-24.

413. We have decided to base LMDS licenses on BTA geographic service areas, finding that BTAs are logical licensing areas for LMDS because they comprise areas within which consumers have a community of interest. We tentatively conclude that a flexible approach to partitioned areas, similar to the one we adopted for broadband PCS, is appropriate for LMDS. We therefore propose to permit partitioning of LMDS licenses based on any license area defined by the parties. We seek comment on this proposal, and in particular on whether there are any technical or other issues unique to the LMDS service that might impede the adoption of a flexible approach to defining the partitioned license area.

3. Minimum or Maximum Disaggregation Standards

414. We seek comment as to whether we should augment our general rule permitting disaggregation of LMDS spectrum in order to establish minimum disaggregation standards. We seek to determine whether, given any unique characteristics of LMDS, technological and administrative considerations warrant the adoption of such standards. We seek comment as to whether we should adopt standards which would be flexible enough to encourage disaggregation while providing a standard which is consistent with our technical rules and by which we would be able to track disaggregated spectrum and review disaggregation proposals in an expeditious fashion.

4. Combined Partitioning and Disaggregation

415. We seek comment regarding whether combined partitioning and disaggregation should be permitted for LMDS. By "combined" partitioning and disaggregation we refer to circumstances in which a licensee would be authorized, for example, to obtain a license for a portion of a BTA with only a portion of the 1,150 megahertz license or the 150 megahertz license involved in the disaggregation of spectrum. As another example, the licensee could obtain a license consisting of a partitioned portion of one or more other licenses held by other LMDS providers *and* a disaggregated portion of one or more other licenses held by other LMDS providers. We tentatively conclude that we should permit such combinations in order to provide carriers with the flexibility they need to respond to market forces and demands for service relevant to their particular locations and service offerings.

5. Construction Requirements

416. In the Order we have adopted today we have promulgated a performance standard under which a licensee must make a showing of substantial service at the end of the license term.[625] In the case of partitioned LMDS licenses, we propose that the partitionee must certify that it will satisfy the same construction requirements as the original licensee.

---

[625] See paras. 266-272, *supra*.

The partitionee then must meet the prescribed service requirements in its partitioned area while the partitioner is responsible for meeting those requirements in the area it has retained.

417. In the case of disaggregated LMDS licenses, we propose to adopt rules for LMDS licensees similar to those disaggregation certification rules we have adopted for broadband PCS.[626] Under such a certification approach, the disaggregating parties would be required to submit a certification, signed by both the disaggregator and disaggregatee, stating whether one or both of the parties will retain responsibility for meeting the performance requirement for the LMDS market involved. If one party takes responsibility for meeting the performance requirement, then actual performance by that party would be taken into account in a renewal proceeding at the end of the license term, but such performance would not affect the status of the other party's license. If both parties agree to share the responsibility for meeting the performance requirement, then the performance of each of the parties would be taken into account in the respective renewal proceedings.

6. License Term

418. In the Order we have adopted today we established a 10-year license term for LMDS licenses. In this Fifth Notice of Proposed Rulemaking we are proposing that LMDS licensees should be eligible for a license renewal expectancy based upon the criteria established in Section 22.940(a) of the Commission's Rules.[627]

419. In the *Partitioning and Disaggregation Report and Order*, we found that allowing parties acquiring a partitioned license or disaggregated spectrum to "re-start" the license term from the date of the grant of the partial assignment application could allow parties to circumvent our established license term rules and unnecessarily delay service.[628] We seek comment as to whether our LMDS rules should similarly provide that parties obtaining partitioned LMDS licenses or disaggregated spectrum hold their license for the remainder of the original licensee's 10-year license term. In addition, we seek comment as to whether LMDS partitionees and disaggregatees should be afforded the same renewal expectancy as we have proposed for other LMDS licensees. We tentatively conclude that limiting the license term of the partitionee or disaggregatee is necessary to ensure that there is maximum incentive for parties to pursue available spectrum as quickly as practicable.

7. Competitive Bidding Issues

---

[626] *Partitioning and Disaggregation Report and Order*, at paras. 61-63.

[627] 47 CFR § 940(a).

[628] *Partitioning and Disaggregation Report and Order*, at para. 77.

420. Competitive bidding issues similar to those in broadband PCS arise in the context of LMDS partitioning and disaggregation. Our competitive bidding rules for the LMDS service include provisions for installment payments and bidding credits for small businesses and businesses with average annual gross revenues not exceeding $75 million. We also adopted rules to prevent unjust enrichment by such entities that seek to transfer licenses obtained through use of one of these special benefits.

421. We tentatively conclude that LMDS partitionees and disaggregatees that would qualify for installment payments should be permitted to pay their *pro rata* share of the remaining Government obligation through installment payments. We seek comment on this tentative conclusion. We further invite comment as to the exact mechanisms for apportioning the remaining Government obligation between the parties and whether there are any unique circumstances that would make devising such a scheme for LMDS more difficult than for broadband PCS. Since LMDS service areas are allotted on a geographic basis, in a manner similar to broadband PCS, we propose using population as the objective measure to calculate the relative value of the partitioned area and amount of spectrum disaggregated as the objective measure for disaggregation, and we seek comment on this proposal.

422. We seek comment regarding whether to apply unjust enrichment rules to small business LMDS licensees, or LMDS licensees with average annual gross revenues not exceeding $75 million, that partition or disaggregate to larger businesses. Commenters should address how to calculate unjust enrichment payments for LMDS licensees paying through installment payments and those that were awarded bidding credits that partition or disaggregate to larger businesses. Commenters should address whether the unjust enrichment payments should be calculated on a proportional basis, using population of the partitioned area and amount of spectrum disaggregated as the objective measures. We propose using methods similar to those adopted for broadband PCS for calculating the amount of the unjust enrichment payments that must be paid in such circumstances, and we seek comment on this proposal.[629]

8. Licensing Issues

423. We propose that all LMDS licensees who are parties to disaggregation or partitioning arrangements must comply with our technical and service rules established in the Order we are adopting today. We also propose that coordination and negotiation among licensees must be maintained and applied in licensing involving disaggregated or partitioned licensees.

[629] *See id.* at paras. 34-35.

424. We propose to treat the disaggregation and partitioning of LMDS licenses to be types of assignments requiring prior approval by the Commission. We therefore propose to follow existing assignment procedures for disaggregation and partitioning.[630] Under this proposal, the licensee must file FCC Form 702 signed by both the licensee and qualifying entity. The qualifying entity would also be required to file an FCC Form 430 unless a current FCC Form 430 is already on file with the Commission.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Analyses

425. The Initial Regulatory Flexibility Analysis, as required by Section 603 of the Regulatory Flexibility Act,[631] is set forth in Appendix C. The Commission has prepared the Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in the Fifth Notice of Proposed Rulemaking. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the local exchange and MVPD industries.

426. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the Fifth Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of the Fifth Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.[632]

427. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act,[633] is set forth in Appendix D.

B. Paperwork Reduction Analyses

---

[630] *See* 47 CFR § 101.56.

[631] 5 U.S.C. § 603.

[632] 5 U.S.C. § 603(a).

[633] 5 U.S.C. § 604.

428. The Second Report and Order imposes new or modified information collection requirements applicable to the public. The Fifth Notice of Proposed Rulemaking contains proposed information collection requirements applicable to the public. As part of our continuing effort to reduce paperwork burdens, we invite the general public to take this opportunity to comment on the information collections contained in the Second Report and Order and the Fifth Notice of Proposed Rulemaking, as required by the Paperwork Reduction Act of 1995.[634]

429. Public and agency comments regarding the information collections contained in the Fifth Notice of Proposed Rulemaking are due on or before 60 days after the publication of the Fifth Notice of Proposed Rulemaking in the Federal Register.

430. Written comments by the public on the new or modified information collections contained in the Second Report and Order are due on or before 30 days after publication of the Second Report and Order in the Federal Register. Written comments must be submitted by OMB on the proposed or modified information collections on or before 60 days after publication of the Second Report and Order in the Federal Register.

431. Comments submitted in accordance with paragraph 429 or 430, *supra*, should address:

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility.
- The accuracy of the Commission's burden estimates.
- Ways to enhance the quality, utility, and clarity of the information collected.
- Ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

432. In addition to filing the comments specified in paragraph 429, *supra*, with the Secretary, a copy of any such comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov. In addition to filing the comments specified in paragraph 430, *supra*, with the Secretary, a copy of any such comments on the information collections contained herein should be submitted to Dorothy Conway, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street,

[634] Pub. L. No. 104-13.

N.W., Washington, D.C. 20503 or via the Internet at fain_t@al.eop.gov. For additional information regarding the information collections contained herein, contact Dorothy Conway.

C. Ex Parte Presentations

433. The Fifth Notice of Proposed Rulemaking is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* Sections 1.1202, 1.1203, and 1.1206(a) of the Commission's Rules.[635]

D. Pleading Dates

434. Pursuant to applicable procedures set forth in Sections 1.1415 and 1.419 of the Commission's Rules,[636] interested parties may file comments to the Fifth Notice of Proposed Rulemaking on or before April 21, 1997, and reply comments on or before May 6, 1997. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

E. Further Information

435. For further information concerning this rulemaking proceeding contact Bob James, Private Wireless Division, at (202) 418-0680, Mark Bollinger or Jay Whaley, Auctions Division, at (202) 418-0660, Auctions Division, or Joseph Levin or Jane Phillips, Policy Division, at (202) 418-1310, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C. 20554.

VI. ORDERING CLAUSES

[635] 47 CFR §§ 1.1202, 1.1203, 1.1206(a).

[636] 47 CFR §§ 1.1415, 1.419.